Portland Arena Sdn Bhd v Sime Darby Property Bhd

HIGH COURT (SHAH ALAM) — SUIT NO 22C-5–05 OF 2013
SEE MEE CHUN J
18 DECEMBER 2014

Contract — Building contract — Defects — Whether quality of workmanship and building materials used in construction of RM4.9m house not commensurate with price of property — Whether term of sale and purchase agreement had been breached — Whether court accepted unrebutted evidence of buyer's expert on defects that needed to be remedied and cost of rectification works

The defendant agreed under a sale and purchase agreement ('SPA') to build and sell a house to the plaintiff for RM4.9m. The plaintiff bought the property for its managing director (PW1) and his family to reside in. However, after the purchase price was settled and vacant possession of the house was delivered, the plaintiff complained that the quality of the workmanship and building materials used in the construction were poor and that this was in breach of the implied terms of the SPA and specifically cl 13 which provided that the defendant would build the property in good and workmanlike manner. The plaintiff hired an expert, PW7, to inspect and prepare a list of defects that needed rectification and to assess the cost for same. In the meanwhile, PW1 and his family rented alternative accommodation so that they would not be disturbed by the dust and noise of rectification works. The plaintiff's instant claim was for the costs for rectification of the property, damages for loss of its use and the cost of appointing PW7 whose report formed the basis of the plaintiff's claim. The defendant did not call any expert to rebut PW2's evidence, but contended that the property was built in accordance with the approved plans in the second schedule of the SPA and that the materials supplied were as specified in the fourth schedule and the building plans. In his evidence, PW2 said that although building materials specified in the fourth schedule of the SPA were used, the quality of the workmanship and materials used were below the standard expected in a property as expensive as the one in the instant case.

Held, allowing the claim:

(1) The court found there had been a breach of cl 13 of the SPA. In the absence of an expert report from the defendant to rebut PW2's evidence, the court accepted the latter's evidence on the defects. Also, because PW2's evidence that his fees was RM300,000 was unrebutted, the claim for same was allowed to the plaintiff (see paras 8, 12 & 16).

(2) The defendant's contention that it was not given an opportunity to rectify the defects as required under cl 25(2) of the SPA was without merit. It was only now that the defendant said that the defects were not defects. If that was the defendant's position that ought to have been made known to the plaintiff earlier on rather than assuring the plaintiff that the rectification works would be carried out (see para 13).

(3) The court accepted PW2's approach of a mean cost quotation for the rectification works. He had compared the quotations made by the plaintiff and the defendant and after incorporating the plaintiff's three quotations and defendant's quotations with the revised median rectification cost of RM949,331 he concluded that rectification at that price would be at cost while if the defendant's quotation was accepted it would be at a loss (see para 14).

[Bahasa Malaysia summary

Defendan bersetuju di bawah perjanjian jual beli ('PJB') untuk membina dan menjual rumah kepada plaintif untuk sejumlah RM4.9 juta. Plaintif membeli hartanah untuk pengarah urusannya (PW1) dan keluarga untuk tinggal di situ. Walau bagaimanapun, selepas harga belian diselesaikan dan milikan kosong diberikan, plaintif mengadu bahawa kualiti kemahiran kerja dan material bangunan yang digunakan dalam pembinaan adalah tidak elok dan bahawa ini adalah memungkiri terma tersirat PJB dan terutamanya klausa 13 yang memperuntukkan bahawa defendan akan membina hartanah dalam cara baik dan baik buatannya. Plaintif mengupah pakar, PW7, untuk menyiasat dan menyediakan senarai kecacatan yang memerlukan pembaikan dan untuk menaksir kos untuk yang sama. Sementara itu, PW1 dan keluarganya menyewa tempat tinggal alternatif oleh itu mereka tidak akan diganggu oleh habuk dan bunyi kerja-kerja pembaikan. Tuntutan plaintif ini adalah untuk kos bagi pembaikan hartanah, ganti rugi untuk kerugian terhadap kegunaannya dan kos melantik PW7 yang laporannya membentuk asas tuntutan plaintif. Defendan tidak memanggil mana-mana pakar untuk mematahkan keterangan PW2, tetapi berhujah bahawa hartanah dibina mengikut dengan pelan yang diluluskan di dalam jadual kedua PJB dan bahawa material yang dibekalkan adalah seperti yang dispesifikasikan di dalam jadual keempat dan pelan bangunan. Dalam keterangannya, PW2 menyatakan bahawa walaupun material bangunan yang dinyatakan di dalam jadual keempat PJB digunakan, kualiti kemahiran kerja dan material yang digunakan adalah di bawah standard yang dijangka di dalam hartanah sebagai mahal seperti yang satu yang dalam kes ini.

Diputuskan, membenarkan tuntutan:

(1) Mahkamah mendapati terdapat kemungkiran klausa 13 PJB. Dalam ketiadaan pakar, laporan daripada defendan untuk mematahkan keterangan PW2, mahkamah menerima keterangan PW2 atas kecacatan.

Juga, kerana keterangan PW2 bahawa finya adalah RM300,000 tidak dipatahkan, tuntutan untuknya adalah dibenarkan kepada plaintif (lihat perenggan 8, 12 & 16).

(2) Hujahan defendan bahawa ia tidak diberi peluang untuk meratifikasikan kecacatan seperti yang dikehendaki di bawah klausa 25(2) PJB adalah tanpa merit. Ia hanya sekarang yang defendan menyatakan bahawa kecacatan adalah bukan kecacatan. Jika ia adalah kedudukan defendan ianya patut dimaklumkan kepada plaintif terlebih dahulu daripada menyakinkan plaintif bahawa kerja-kerja pembaikan akan dijalankan (lihat perenggan 13).

(3) Mahkamah menerima pendekatan PW2 mengenai sebut harga kos 'mean' untuk kerja-kerja pembaikan. Dia membandingkan sebut harga yang dibuat oleh plaintif dan defendan dan selepas menggabungkan tiga sebut harga plaintif dan sebut harga defendan dengan kos pembaikan median yang disemak sebanyak RM949,331 dia menyimpulkan bahawa pembaikan pada harga tersebut akan menjadi pada kos sementara jika sebut harga defendan diterima ia akan menjadi kerugian (lihat perenggan 14).]

Notes

For cases on defects, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3590–3596.

Cases referred to

Lim Chon Jet @ Lim Chon Jat & Ors v Yusen Jaya Sdn Bhd [2011] 5 MLJ 239; [2011] 8 CLJ 598, HC (refd)

PP v Tubbs Julia Elizabeth [2001] 4 SLR 75, HC (refd)

Colin Pereira (Goh Wong Pereira) for the plaintiff.

Karamjit Singh (Bhadarul Baharain & Partners) for the defendant.

See Mee Chun J:

[1] By a sale and purchase agreement dated 1 June 2011 between the plaintiff as purchaser, defendant as vendor and Highlands and Lowlands Bhd as proprietor (S&P B 8–43) the plaintiff agreed to purchase and defendant agreed to construct and sell a detached house with address 26 Jalan Anjung U8/35 Bukit Jelutong Shah Alam (subject property) for a purchase price of RM4,939,607 (purchase price). The purchase price has been paid with 5% held by the stakeholders. Vacant possession was delivered sometime in May 2012 (B 41 letter of defendant dated 7 May 2012 that vacant possession ready to be delivered).

[2] This is the plaintiff's claim against the defendant for the costs of

rectification of subject property, damages for loss of use and the cost of appointing an expert. The basis of the claim is the breach of cl 13 of S&P and a breach of implied terms of S&P in failing to construct subject property using a quality of materials and in accordance to a standard that commensurates with the purchase price and the materials and finishes deviated from the mock up unit. The defendant has denied the claim and states subject property was constructed in accordance with the plans in second schedule and normal construction practice. What are alleged to be defects are the plaintiff's dissatisfaction with the finishes and any defects were within tolerable levels. The materials supplied were in accordance with fourth schedule and building plans.

[3] Witnesses for the plaintiff were Mr Izz Mika'il bin Abdullah (PW1, managing director and witness statement marked as WSP1) and Dr Ernest Cheong Yong Yin (PW2, consultant and managing director of Ernest Cheong PTL (M) S/B (EC) and witness statement marked as WSP2). Witnesses for defendant were Mr Hasmi Malek @ Hashim (DW1, Township and Community Services at the material time and witness statement marked as WSD1), Ms Aziin Shereen bt Abu, (DW2, architect in BEP Akitect S/B and witness statement marked as WSD2), Mr Chooi Kuen Wah, (DW3 project manager Kitacon S/B and witness statement marked as WSD3) and Mr Pua Ching Tian, (DW4, public engineer (Mechanical) PE Associates S/B and witness statement marked as WSD4).

BREACH OF SALE AND PURCHASE AGREEMENT

[4] It will first be considered whether the defendant has breached cl 13 of S&P. Clause 13 provides that the defendant would construct subject property in a good and workmanlike manner in accordance with the description in fourth schedule and in accordance with the plans approved by the appropriate authority as set out in the second schedule.

[5] PW2 was appointed by the plaintiff as its expert to investigate, identify and compile the list of defects and ascertain the costs of rectification. After PW2's appointment he visited the subject property over many days in January 2013 and inspected the defects. His findings are in defects rectification report dated 15 April 2013 (B3). He visited subject property again in November 2013 over many days and inspected new defects and his findings are in defects rectification supplemental report dated 16 December 2013 (B4). These reports form the basis of the plaintiff's claim on defects.

[6] In Q&A 54 of WSP2 when commenting on the defendant's assertion that subject property was constructed in accordance with fourth schedule PW2 stated this represented the generic term and description of the materials but did

not state the quality and/or brand. By way of example for floors in the master bedroom the building materials would be 'marble/timber' and for sanitary ware and plumbing fittings in the master bedroom the building materials would be 'water closet, wash basin, shower, hose, long bath, toilet roll holder'. PW2 accepted the building materials as listed in fourth schedule were used but as to whether defendant complied with its obligations depended on the quality of workmanship and building materials used. The identified defects in B3 and B4 are proof the defendant did not comply with and did not honour its obligations. In Q&A 38 he stated there is a correlation in the price paid for a property and the quality of workmanship and material used. The more expensive the property the higher and greater the purchaser's expectation that the property is built/constructed as far as humanly is possible, defects free and with the highest standard and quality of workmanship. This is explained in Q&A 39 that after paying an expensive price it is reasonable to so expect. In Q&A 54 he explained for the expensive purchase price paid for the subject property it is reasonable for the plaintiff to expect the defendant delivers a property that is, as far as humanly possible, defects free. It would also be reasonable for the plaintiff to expect the defendant to use the highest standard and best quality building materials to build the expensive property. Refer Q&A 27 where he explained the rectification measures was necessary after considering and recognising the hefty and expensive purchase price and if the plaintiff had purchased a low priced apartment or terrace house of RM400,000 it would be willing to accept some minor defects and the use of lower standard and lower quality building materials. The analogy of the purchaser of a BMW 7 series car and a Proton was used where a squeak, bump, jerk or rattle will not be tolerated in a BMW but in a Proton.

[7] The evidence of PW2 is that the defendant had used the building materials in fourth schedule. However it is further his evidence it had not been constructed using the highest standard and quality of workmanship; in other words it was not constructed in a good and workmanlike manner relative to the price which required the highest standard and quality of workmanship.

[8] In this regard the court firstly considers the contention raised by the plaintiff that the defendant had not called any expert to rebut PW2 and as such his evidence on defects should be accepted. The defendant in turn countered it was the plaintiff that did not agree to its expert inspecting subject property and had asked the court to draw an adverse inference against such refusal. PW1 had explained plaintiff had not agreed to inspection as the defendant's letter for inspection in B1 328 was dated 6 June 2013 and the defects were raised a year earlier when the defendant had then inspected. In any event that letter requesting inspection did not mention it was to be Construction Industry Development Board. This explanation is reasonable and no adverse inference for the plaintiff's refusal for inspection will be drawn and under the

circumstances in the absence of an expert report from the defendant to rebut PW2's evidence the court ought to accept PW2's evidence on the defects.

[9] In *Public Prosecutor v Tubbs Julia Elizabeth* [2001] 4 SLR 75 it was stated at p 87:

> While the court is not obliged to accept expert evidence by reason only that it is unchallenged, where the expert's view is based on solid grounds and supported by the basic facts, the court can do little else but to accept the findings of the experts. Accordingly the found no reason in this case to disturb the findings of the experts...especially since the prosecution did not consider it necessary to so challenge their views at the trial stage.

[10] The defendant also contended PW2's consultancy fees which would depend on the amount of compensation received by the plaintiff had resulted in him exaggerating the losses suffered in order to increase his fees and on that score his evidence ought to be disregarded as not being independent and on account of being an interested party. PW2 consultancy fees is a matter between him and the plaintiff and the court without more is not prepared to disregard his reports and evidence solely on the fees structure.

[11] The defendant contended PW1 had never complained the purchase price was expensive. However PW1 had stated his dissatisfaction on the finishes in terms of quality and materials was based on the price paid.

[12] Under the circumstances there had been a breach of cl 13 of S&P.

WHETHER PLAINTIFF GIVEN OPPORTUNITY TO RECTIFY

[13] After taking vacant possession in May 2012 the plaintiff had raised the issue of defects as early as July 2012. Defects rectification forms in B1 65- 78 and 147-206 and B2 387-388 were submitted to the defendant. There were letters of complaint written namely dated 4 July 2012 (B1 144-145), 3 August 2012 (B1 115-128), 7 August 2012 (B1 129-139), 17 August 2012 (B1 109), 29 August 2012 (B1 104-107) and 17 October 2012 (B1 64). A letter dated 19 September 2012 (B1 99-100) was to put on record the time limit for the defendant to rectify the defects had expired and the plaintiff was entitled to carry out its own repairs and enclosed the quotation for repair works. Another letter dated 1 October 2012 (B1 81-82) was sent on no action to rectify and plaintiff would exercise its rights under cl 25 of S&P. The defendant's reply dated 2 October 2012 (B1 86A) was that rectification works would be completed on 3 October 2012 and the defendant would not be rectifying two items for which a discussion on the plaintiff's quotation was required. A letter dated 23 October 2012 (B1 58) was written subsequent to a joint inspection and plaintiff had requested the defendant's proposal as to how the defects

would be rectified. The defendant's reply dated 24 October 2012 (B1 59) was an assurance it would be looking at the matter raised. It follows that the defendant's contention it had not been an opportunity to rectify the defects as required under cl 25(2) of S&P is without merit. It is only now that the defendant says the defects are not defects. If that is the defendant's position that ought to have been made known to plaintiff early on rather than assuring the plaintiff rectification works would be carried out.

COSTS OF RECTIFICATION

[14] In order to arrive at the rectification costs separate contractors were invited to submit their quotations based on the defects and their quotations are in Appendix 5-7 of the B3 and Appendix 1-3 of B4. A mean cost quotation was arrived at and is in Appendix 4 of B3 and B4. In Q&A 28 total rectification costs were RM81,932 (lower ground) + RM592,902 (ground) + RM293,848(1st floor) = RM968,682 and for the additional defects are RM 126,350 (Q&A 44 and 48). This was not challenged by defendant who instead sought to challenge the costs by submitting a quotation in D7. PW2 had prepared B6 and B7. B6 is a comparison of plaintiff's costs and defendant's costs. B7 is the incorporation of the plaintiff's three quotations and defendant's quotation with the revised median rectification cost being RM949,331. If the contractor does the rectification at this price it will be at cost and at RM512,229 which is the defendant's quotation it will be at a loss. PW2 approach of mean cost quotation is accepted.

LOSS OF USE OF PROPERTY

[15] This claim is not premised on rental of property. It was PW1 evidence the plaintiff purchased subject property for him and his family to reside in. As to why he hadn't moved in he explained this was not a safety issue and if he had moved in and repairs were needed to be done he and his family would be living in dust and noise. In Q&A 41 PW2 explained the claim for loss of use which was premised on subject property being bought for PW1 and family to reside in and the need to rent alternative accommodation as they were not able to move in due to the defects. Computation of rental value was on the basis of the purchase price and the expectation of a 5%pa investment return and this would represent a twenty years purchase from which RM20,000 was arrived at. Although subject property was purchased not for investment it is up to the plaintiff what they want to do. This is the rental that would be incurred for the plaintiff to live in a similar quality house or what he would have got if it had been rented out. He disagreed it would yield a 3%pa investment return. As the claim on loss of use is premised on loss of investment return the issue of actual rental does not arise.

PW2'S PROFESSIONAL FEES

[16] In Q&A 41 PW2 stated RM300,000 to be his professional fees. The defendant stated the evidence only showed he had been paid RM50,000. However the unrebutted evidence of PW2 is that RM300,000 are his fees. In the absence of evidence the fees is excessive or unreasonable this claim is allowed.

[17] In *Lim Chon Jet & Ors v Yusen Jaya Sdn Bhd* [2011] 5 MLJ 239 at p 261; [2011] 8 CLJ 598 it was stated at p 622 (CLJ):

> ... There is no rebuttal by the defendants of these costs and since these fees in my view are reasonable professional fees, I accept them as legitimate expenditure on the part of plaintiffs in pursuing this case.

CONCLUSION

[18] The plaintiff's claim in paras 13(i), (ii), (iii) and (iv) for the additional rectification costs of RM126,350 is allowed and interest of 5% from date of judgment until date of settlement. Costs to the plaintiff.

Claim allowed.

Reported by Ashok Kumar